DEC 21 1972

MICHAEL RODAK, JR., CLE

In the

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-5746

RENDELL NOEL MABEY, JR., and EDWARD P. DUTTON,
Petitioners,

vs.

RONALD REAGAN, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief For Respondent In Opposition

PETITION NOT PRINTED

EVELLE J. YOUNGER
Attorney General

ELIZABETH PALMER
Assistant Attorney General

DAVID J. BOWIE
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: (415) 557-2620

Attorneys for Respondents

BORG PRINTING COMPANY OF CALIFORNIA, 546 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Regulations Involved	2
Statement of the Case	2
Reasons for Denying the Writ	2
I. California's Consultative Tenure Process (Grievance Procedures) Satisfies Constitutional Requirements as Enunciated by This Court	3
II. Certiorari Should Be Denied as It Is Clear That Due Process Does Not Require the Appearance of a Lawyer as Counsel for a Probationary Academic Employer at an Administrative Hearing Dealing with the Nonretention of Said Employee	7
III. The Lower Court Properly Based Its Decision on Facts Presented in the Record Before It	9
Conclusion	9

AUTHORITIES CITED

Cases

	Pages
Board of Regents v. Roth, 408 U.S. 564 (1972)	2, 4, 6
Boddie v. Connecticut, 401 U.S. 371 (1971)	5
Cafeteria and Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886 (1961)	3
Dixon v. Alabama State Bd. of Education, 294 F.2d 150	8
Drown v. Portsmouth School District, 435 F.2d 1182 (1970)	6, 7
Ferguson v. Thomas, 430 F.2d 852 (5 Cir. 1970)	8
Perlman v. Shasta Joint Hardway, 283 F. Supp. 228 (1968)	8
Perry v. Sindermann, 408 U.S. 593 (1972)	2, 4, 6
Sindermann v. Perry, 430 F.2d 939, 944 (5 Cir. 1970)	8
Whitner v. Davis, 410 F.2d 24 (9 Cir. 1969)	3

Other Authority

Executive Order 112	3, 4, 6

In the

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-5746

RENDELL NOEL MABEY, JR., and EDWARD P. DUTTON,
Petitioners,

VS.

RONALD REAGAN, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief For Respondent In Opposition

OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit is found at Appendix A of the Petition. The Memorandum Decision of the United States District Court for the Northern District of California has been published as *Toney, et al. v. Reagan, et al.*, 326 F. Supp. 1093. It is found at Appendix B of the Petition.

JURISDICTION

The jurisdiction of this Court has been adequately presented by petitioners.

QUESTIONS PRESENTED

The questions presented before this Court have been adequately stated by petitioners.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are adequately stated in the Petition and are reproduced in Appendix C of the Petition.

STATEMENT OF THE CASE

The statement of the case has been adequately presented by petitioners.

REASONS FOR DENYING THE WRIT

In 1972, this Court decided the cases of *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972) pertaining to the rights of probationary academic employees insofar as termination of employment is concerned. In these decisions, this Court held that such an academic employee has no constitutional right to a statement of reasons and a hearing on his university's decision not to rehire him.

The issue posed in the Petition, although not precisely dealt with in the *Roth* and *Sindermann* opinions, is well within their import. Namely, the issue herein is as to the adequacy of Executive Order 112 grievance procedures as an available administrative remedy within the definition of minimum due process standards. As the probationary academic employee is not constitutionally entitled to the safeguards of a statement of reasons and a hearing, only a fair and adequate proceeding is required when a hearing is provided by state law.

I. California's Consultative Tenure Process (Grievance Procedures) Satisfies Constitutional Requirements as Enunciated by This Court.

Pursuant to grievance procedures implemented by Executive Order 112, probationary academic employees of the California State University and Colleges who are given notice of the decision not to rehire them for another year are entitled to a hearing. During such hearing, they are informed of the reasons for their nonretention and are provided the opportunity to challenge the sufficiency thereof upon specified grounds. Petitioners' procedural due process arguments for certiorari are as to the adequacy of the hearing process prescribed thereby as an administrative remedy to forestall a threatened deprivation of constitutional rights.

Inasmuch as the hearing process provided such employees is designed to offer a prospective administrative remedy, this remedy, if consistent with minimum standards of due process, must be exhausted prior to recourse to the federal courts. *Whitner v. Davis*, 410 F.2d 24 (9 Cir. 1969). As was stated in *Cafeteria and Restaurant Workers Union, Local 473, v. McElroy*, 367 U.S. 886 (1961), the determination of what is required depends upon the circumstances in each case:

> "The very nature of due process negates any concept of inflexible procedures universally applicable to any imaginable situation. . . . '[D]ue process' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. It is 'compounded of history, reason, the past course of decisions . . .'" *Cafeteria and Restaurant Workers Union, Local 473 v. McElroy, supra* at 895.

In light of these considerations, it is submitted that the test to be applied herein is whether the administrative hearing

may reasonably be said to offer a fair and adequate means of correcting or avoiding administrative action which is based upon constitutionally improper grounds.

The process for determining whether to reappoint a probationary faculty member or give him tenure, involves recommendations for the faculty member's peers in his department and throughout various levels of the university. The final decision is that of the president of the university, although the process of obtaining substantial input from throughout the university by its very nature contains built in checks against arbitrary action. Traditionally, such a tenure review has provided the only protection against arbitrary action within the institution given the probationary employee.

The various courts which have wrestled with the problem of whether a nontenured academic employee had a right to a statement of reasons or a hearing upon nonrenewal of his contract have come to varying conclusions. Recently, the conflicts in opinion in this regard were settled by this Court's decisions in *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972). The holding of such decisions is to deny that there is constitutional entitlement to a statement of reasons and a hearing on the university's decision not to rehire. By clear inference therefrom, the consultative tenure process described above satisfies constitutional requirements.

Nonetheless, within the California State University and Colleges, a probationary faculty member is additionally provided with grievance procedures under which the initial decision not to reappoint may be challenged. Executive Order 112 implements a comprehensive system for correcting a wrong which may have occurred in making an initial administrative decision, involving not only decisions not to

reappoint, but promotions and grievances regarding working conditions as well. The procedures permit challenge whenever it is alleged that the action was arbitrary, that there was a substantial departure from duly established procedure, or when substantial evidence favorable to the grievant has been ignored in making the decision. The express listing of reasons is not required by minimum standards of due process under circumstances in which such extensive hearing procedures permit the probationary faculty member to challenge his non-retention and thus raise the question of the reasons therefor.

Furthermore, in the determination of the form of hearing, required in particular situations by procedural due process, a weighing of the respective interests of the parties is important. *Boddie v. Conneticut* 401 U.S. 371 (1971). In cases involving tenure or retention of probationary academic employees, the decision not to reappoint is often based upon a variety of reasons. Under the complex evaluation process which involves evaluation by the faculty member's colleagues, each person in the process may have a different reason for his negative decision. Additionally, the practical result of a requirement regarding reasons would be a chilling effect on the making of negative recommendations. If the imposition of such a burden would lead to an abrogation by college personnel of their evaluation functions, the eventual outcome could be the erosion of the tenure system itself.

Contrary to petitioners' assertions in their argument for certiorari, there is currently no apparent conflict in the various Circuit Courts of Appeals regarding constitutional entitlement to a statement of reasons for nonretention when a hearing is provided the probationary academic employee. Indeed, only the Ninth Circuit's decision below has

addressed itself to the specific issue since this Court's decisions in *Roth* and *Sindermann, supra*. In view of the specific holding of *Roth* that the probationary academic employee is not constitutionally entitled to either a statement of reasons or a hearing, the source of potential confusion regarding the issue is elusive.

The First Circuit, in *Drown v. Portsmouth School District*, 435 F.2d 1182 (1970), decided prior to *Roth* and *Sindermann, supra*, held, essentially, that where no hearing or similar remedy is provided by which the employee can ascertain the reasons for his nonretention, due process requires at least that a written statement of such reasons be provided. 435 F.2d at 1185. The court did not discuss what would be the result if the school provided a hearing, nor did the court hold that giving written reasons was the only constitutionally acceptable solution. The court's rationale, however, did indicate that other solutions which would further the object of correcting an improper decision would satisfy the requirements of due process. Under this rationale, Executive Order 112 is more than adequate.

Petitioners have been unable to cite any other case in which a statement of reasons has been equated with due process requirements, nor have they been able to point to any case in which a hearing is provided wherein reasons are so required. It is submitted that the Ninth Circuit's decision is not inconsistent with the holding of *Drown v. Portsmouth School District, supra* and, in any case, is in conformity with *Roth* in its holding that Executive Order 112 provides a fair and adequate remedy to protect against a threatened deprivation of constitutionally protected rights. For these reasons, it is urged that certiorari be denied.

II. Certiorari Should Be Denied as It is Clear That Due Process Does Not Require the Appearance of a Lawyer as Counsel for a Probationary Academic Employer at an Administrative Hearing Dealing with the Nonretention of Said Employee.

The tenure system is a longstanding academic tradition which permits the institution to evaluate the employee before giving him permanent status. It has contributed much to the quality of higher education in the United States and is supported by administrators as well as by the faculty themselves. Imposing too many burdens on the decision not to retain a probationary faculty member would have such unsalutary purposes as diverting from the educational functions of universities increased amounts of funding for adjudication apparatus and adversely affecting the hiring of probationary employees. The interests of the individual probationer in continued employment is insubstantial indeed when contrasted with those of the public, the institution and other professors in ensuring that only those who are fully qualified achieve tenure.

Contrary to petitioners' contentions, the due process clause does not require the imposition of trial-like procedures upon administrative grievance proceedings. Petitioners have cited no authority involving a probationary teacher which requires the presence of an attorney at a grievance proceedings.

In *Drown v. Portsmouth School Dist. supra*, 435 F.2d 1182 (1 Cir. 1970), a probationary public school teacher who was not reappointed for the following year contended that due process required a full adversary hearing with counsel and the legal rules of evidence. Balancing the interests of the parties, the court held that such a hearing was not required by due process, stating:

> "It is obvious that the kind of hearing sought by appellant, *see* note 1, *supra*, would involve the full trappings of counsel, cross-examination, rules of evidence, a verbatim record, and a decider other than the school board. Not only would the invoking of such adjudicative apparatus be an added, expensive and unfamiliar obligation for the school district, but the very existence of the right of a non-tenured teacher to such a hearing would have two side effects, equally unfortunate. In the first place, administrators would be less likely to recommend that teachers not be rehired if they knew that such a decision might require them to go through the time, expense, and often the personal discomfort of a full scale hearing. In such circumstances, the school board is more likely to tolerate incompetent teachers. At the same time, administrators would, to avoid these difficulties in the future, follow a counsel of over-caution in their hiring practices. The innovative teacher would have a more difficult time finding employment if school districts fear they cannot afford to take a chance on him. And the schools would be left with a teaching force of homogenised mediocrities."

Other cases have also held that procedural due process does not require the presence of an attorney.[1]

The participation of attorneys would virtually necessitate the presence of a legally trained hearing officer to rule upon objections and resolve other legal disagreements. Their presence would therefore remove the hearing from the control of the academic community and preclude any exercise of administrative expertise in resolving issues of administrative discipline, teachers competence and school policy.[2] For all of these reasons it is urged that certiorari be denied.

---

1. A student suspended from college has not entitlement to an attorney at a disciplinary hearing; see *Perlman v. Schasta Joint Hardway*, 283, F. Supp. 228 (1968); *Dixon v. Alabama State Bd. of Education*, 294 F.2d 150, cert. den. 368 U.S. 930.

2. See *Sindermann v. Perry*, 430 F.2d 939, 944 (5 Cir. 1970); *Ferguson v. Thomas*, 430 F.2d 852 (5 Cir. 1970).

III. The Lower Court Properly Based Its Decision on Facts Presented in the Record Before It.

Petitioners have repeatedly complained that they were not given reasons for the decisions with respect to their reappointments. Such complaints, however, are inconsistent with the detailed factual allegations contained in their Complaint for Declaratory Relief and Injunction and Redress of Civil Rights. (See C.T. 1) In addition petitioners were provided with the reports showing the recommendations of their respective departments and the dean. These reports, which were attached to the complaint, discuss the reasons for the negative recommendations.

Finally, as correctly observed by the Ninth Circuit, the requirement under the grievance procedure that the grievant seek informal resolution of the problem at the beginning of the proceedings is indeed reasonably calculated to give the grievant notice of the reasons for which the college acted. Despite the policy of the California State University and Colleges (as expressed by C. Mansel Keene (C.T. 275-276)) that reasons for non-retention of a probationary employee need not be stated, it seems apparent that these procedures are designed to fairly provide notice to the employee of the general reasons for his nonretention and, in these circumstances, did indeed do so.

CONCLUSION

For the foregoing reasons stated, it is respectfully submitted that the Petition for Certiorari be denied.

EVELLE J. YOUNGER
Attorney General
ELIZABETH PALMER
Assistant Attorney General
DAVID J. BOWIE
Deputy Attorney General
Attorneys for Respondents